UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0819

September Term, 2015

ROBERT L. BURY, SR., et al.

v.

C. LARRY HOFMEISTER, JR., et al.
SUBSTITUTE TRUSTEES

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: September 22, 2016

This case involves a residential foreclosure proceeding that traces its roots to 2008. The foreclosure sales were delayed by no fewer than four bankruptcy filings, two by each of the two homeowners. After repeatedly obtaining relief from the automatic stay in bankruptcy, the substitute trustees finally conducted a foreclosure sale in August 2014. The circuit court overruled the homeowners' exceptions to the sale in December 2014 and denied their motion to alter or amend in May 2015. After the ratification of the sale in June 2015, the homeowners appealed. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Mr. Robert L. Bury, Sr., and Ms. Cynthia A. Bury refinanced their home loan in Halethorpe, Maryland, in 2007, with a $161,000.00 loan from Eastern Savings Bank. In connection with the loan, the Burys signed a promissory note and a deed of trust.

By 2008, the Burys' loan had fallen into default. Consequently, on September 16, 2008, C. Larry Hofmeister and others, as substitute trustees under the promissory note that the Burys had signed, commenced a foreclosure proceeding in the Circuit Court for Baltimore County.

On November 20, 2008, the day before the foreclosure sale was scheduled to occur, Ms. Bury filed a petition for relief from her creditors under Chapter 13 of the United States Bankruptcy Code. The petition resulted in an automatic stay of the foreclosure. *See* 11 U.S.C. § 362.

In June 2009, the lender succeeded in terminating the automatic stay. The lender scheduled another foreclosure sale for August 4, 2009. On the day before that sale was to occur, however, Mr. Bury filed a petition for relief from his creditors under Chapter 13 of

the United States Bankruptcy Code. His petition resulted in another automatic stay of the foreclosure.

In response to the lender's motion for relief from the automatic stay, Mr. Bury moved to dismiss his bankruptcy case. On February 10, 2010, the bankruptcy court dismissed his case with prejudice.

After filing the current foreclosure proceeding on May 28, 2010, the lender scheduled a third foreclosure sale for August 11, 2010. Once again, however, Mr. Bury filed a petition for relief from his creditors under Chapter 13 on the day before the sale was to occur. The petition resulted in yet another automatic stay of the foreclosure.

After a tortuous history of additional defaults, cures, and further defaults, the lender once again obtained the right to foreclose on the Burys' property in July 2012. It scheduled yet another foreclosure sale for September 17, 2012. Two days before the sale was to occur, however, Ms. Bury filed a second petition for relief from her creditors under Chapter 13. The petition resulted in a fourth stay of the foreclosure sale.

On November 19, 2012, the bankruptcy court entered a consent order in Ms. Bury's bankruptcy case. Under the consent order, the Burys and the lender agreed to the termination of the automatic stay in bankruptcy and to the imposition of an equitable servitude on the Burys' property. In addition, the lender agreed to forebear from foreclosing on the property as long as the Burys adhered to a payment plan. If the Burys defaulted on their obligations, the lender could file an affidavit of default in the bankruptcy court, "whereupon" it would "then be authorized to immediately proceed with a foreclosure sale."

On June 5, 2014, the lender filed an affidavit of default in the bankruptcy court. The affidavit, which the lender's representative signed under the penalty of perjury, attested that Ms. Bury had defaulted under the consent order by failing to make the payment that became due on May 1, 2014. The affidavit specifically asserted that Ms. Bury had tendered that payment, but that her check had been returned because of insufficient funds.

On June 6, 2014, Ms. Bury, through counsel, responded to the affidavit of default. The response did not deny that she had defaulted. To the contrary, the response asserted that "[o]n June 9, 2014, the Debtor [Ms. Bury] will tender to [the lender] the May and June mortgage payments." In other words, the response clearly implied that as of the date of the response on June 6, 2014, the Burys had made neither the May nor the June 2014 payments, as there would be no need to tender the payments if they had already been made.

On July 17, 2014, the bankruptcy court conducted a hearing concerning the lender's affidavit of default and Ms. Bury's response. The transcript of the hearing reflects that Ms. Bury herself attended it. At the hearing, Ms. Bury's counsel represented that on June 9, 2014, her client had tendered the May payment (but not the June payment as she had said she would), but that the lender had refused to accept it. Counsel asked the court for permission to tender the May payment on the date of the hearing, the June payment on the following day, and the July payment on July 25, 2014. Ms. Bury did not correct her counsel's implicit concession that as of the date of the hearing the Burys had made neither the May, nor the June, nor the July payments. Nor did Ms. Bury object,

either personally or through counsel, to the statement by the lender's counsel that "[t]here is no dispute that [Ms. Bury] defaulted under the consent order as a result of her failure to make the May and June payment[s]." The bankruptcy court granted Ms. Bury's request to make the May payment on the day of the hearing, the June payment on the following day, and the July payment on Friday, July 25, 2014.

On Monday, July 28, 2014, the lender filed a document advising the bankruptcy court that Ms. Bury "did not tender any funds" in satisfaction of her default and that she "failed to cure the payment default" by the deadline that she herself had requested. Ms. Bury did nothing to dispute the lender's representation.

On the lenders' behalf, the substitute trustees scheduled another foreclosure sale – the fifth – for August 20, 2014. They sent notice of the sale to the Burys and advertised the sale in *The Jeffersonian*, a newspaper in Baltimore County. The advertisement gave the correct address of the property and described it as "a bungalow[-]style dwelling" that was "believed to contain three bedrooms, one bath, a full basement, and a deck." The advertisement added that neither the auctioneer, the beneficiary of the deed of trust, the substitute trustees, nor their agents or attorneys made "any representations or warranties with respect to the accuracy of the information" in the advertisement. Instead, the advertisement "urged" prospective bidders "to perform their own diligence" before the auction. Finally, the advertisement advised bidders to communicate with the substitute trustees, who were identified by name, if they wanted additional information.

The foreclosure sale went forward as scheduled on August 20, 2014, and the lender bought the property for $171,000.00.

The Burys filed timely exceptions. Among other things, their discursive exceptions asserted that the advertisement of the sale was defective and that the Burys "weren't really in default" in the summer of 2014, when Ms. Bury's attorney repeatedly admitted to the bankruptcy court that they were. To support the assertion that they "weren't really in default" in 2014, the Burys attached an affidavit from Ms. Bury, in which she pointedly omitted any representation that she had signed under the penalty of perjury.[1] The Burys requested a hearing.

By order dated Wednesday, December 17, 2014, the circuit court overruled the exceptions without conducting a hearing.

On Monday, December 29, 2014, the Burys filed a timely motion to alter or amend the judgment. In that motion the Burys complained that the court had not held a hearing on their exceptions. In addition, the Burys complained, for the first time, that they had not received proper notice of the foreclosure sale.

On May 1, 2015, after the substitute trustees had submitted evidence confirming that Ms. Bury had received timely notice of the foreclosure sale by certified mail, the circuit court denied the motion to alter or amend. On May 8, 2015, the Burys filed a notice of appeal of that ruling, but withdrew the notice on May 26, 2015, presumably in recognition that it was premature.

[1] In the affidavit Ms. Bury "affirm[s]" that her representations "are true and correct to the best of [her] information, knowledge, and belief." By contrast, Md. Rule 1-304 prescribes the following general form of an affidavit: "I solemnly affirm *under the penalties of perjury* that the contents of the foregoing paper are true to the best of my knowledge, information, and belief." (Emphasis added.)

On May 29, 2015, the circuit court ratified the foreclosure sale, and the clerk entered judgment on June 3, 2015. On the following day, June 4, 2015, the Burys moved to alter or amend the judgment ratifying the foreclosure sale. On June 12, 2015, before the court had the opportunity to consider that motion to alter or amend, the Burys filed another notice of appeal.

Earlier this year, this Court advised the parties that under Rule 8-202(c) the effect of the notice of appeal was delayed until the circuit court decided the motion to alter or amend or the Burys withdrew it. *See Edsall v. Anne Arundel County*, 332 Md. 502, 506 (1993). In response, the Burys withdrew the motion in a document that was docketed on April 13, 2016. Consequently, we now have jurisdiction over the appeal.

QUESTIONS PRESENTED

The Burys have presented two, broadly-worded questions, which we quote:

1. Whether the Circuit Court abused its discretion by overruling the borrowers' exceptions and ratifying the sale without considering the particular circumstances of this case, especially when the Burys' [sic] raised: (1) issues of fraud that were intertwined with the setting of the sale, (2) deficient advertisement of sale, (3) improper notice of the sale and (4) lack of appropriate scrutiny of the sale.

2. Whether the Circuit Court erred as a matter of law by overruling the borrowers' exceptions to sale, ratifying the sale and awarding possession of the property without ensuring that the Substitute trustees [sic] had complied with all applicable Maryland rules and statutory provisions.

For the reasons that follow, we answer both questions in the negative.

STANDARD OF REVIEW

When reviewing a trial court's ruling on exceptions to a foreclosure sale, we determine legal questions without deference, but we generally leave factual

determinations in the hands of the trial courts. *Burson v. Capps*, 440 Md. 328, 342 (2014). "[W]e do 'not substitute our judgment for that of the lower court unless it was clearly erroneous.'" *Id.* (quoting *Jones v. Rosenberg*, 178 Md. App. 54, 68 (2008) (further quotation marks omitted)). "'If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.'" *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (quoting *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002)).

DISCUSSION

Beneath their broadly-worded questions, the Burys make a number of more specific arguments. They challenge the veracity of the affidavit of default that the lender filed in Ms. Bury's bankruptcy case. They complain that the lender violated Md. Code (1974, 2015 Repl. Vol.), § 7-105.1(i) of the Real Property Article ("RP") because it failed to provide them a final loss mitigation affidavit or an application to request mediation. They dispute the sufficiency of the notice of sale. They argue that the lender had unclean hands. They claim not to have received timely notice of the sale. Finally, they assert that the court could not deny their exceptions without conducting a hearing. None of these arguments has any merit.

A. The Veracity of the Affidavit of Default

The Burys contend that the circuit court erred in rejecting exceptions based on a "fraudulent affidavit of default," which the lender filed in the bankruptcy court before, the Burys now say, they were actually in default. In support of their contention, the Burys dispute the lender's sworn assertion that Ms. Bury had defaulted by failing to make

the May 2014 payment by citing Ms. Bury's unsworn assertion that she had actually made that payment. The Burys, however, not only made no such assertion in the bankruptcy court at the time when it was considering the affidavit of default, but their present position contradicts the position they took at the time.

In the bankruptcy court, Ms. Bury never denied that she was in default. Instead, in response to the affidavit of default, she made a written representation (through counsel) that she would tender the past-due payment at a future date, which she would not need to do if she and her husband were not already in default. At a hearing before the bankruptcy court, Ms. Bury's counsel requested (and obtained) permission to tender the several past-due payments in accordance with a new deadline, which she would not need to do had she already met the obligations under the old deadline. When the lender asserted that the Burys had defaulted again by failing to meet the new deadline, they did not dispute the assertion.[2]

The veracity of the affidavit of default was a question of fact for the circuit court, which we must uphold if it is supported by competent evidence. *See*, *e.g.*, *Solomon v. Solomon*, 383 Md. at 202. In these circumstances, it would be more than a minor understatement to say that the record contains competent evidence to support the circuit court's rejection of the Burys' contention.

[2] At oral argument, the Burys said that Ms. Bury was no longer represented by counsel when the lender informed the bankruptcy court of their failure to meet the new deadlines. The record does not support that statement.

In any event, the veracity of the affidavit of default is not a proper subject for exceptions to a foreclosure sale. "[E]xceptions to the sale may challenge only procedural irregularities at the sale," *Greenbriar Condo., Phase I Council of Unit Owners, Inc. v. Brooks*, 387 Md. 683, 688 (2005), such as allegations that "the advertisement of sale was insufficient or misdescribed the property, [that] the creditor committed a fraud by preventing someone from bidding or by chilling the bidding," that the price was unconscionable, *id.* at 741, or that the creditor failed to provide proper notice. *Jones v. Rosenberg*, 178 Md. App. at 69; *see also Thomas v. Nadel*, 427 Md. 441, 446 (2012) (stating that an allegation of fraud with respect to the procedure of the sale may be asserted properly in a post-sale exception). The challenge to the affidavit of default pertains to the lender's right to initiate the foreclosure process, not to irregularities in the foreclosure sale. For that additional reason, the circuit court did not err in rejecting that aspect of the Burys' exceptions.[3]

B. Compliance with RP § 7-105.1(i)

The Burys contend that the circuit court ratified the foreclosure sale even though the substitute trustees failed to comply with RP § 7-105.1(i), which requires a foreclosing lender, beginning on July 1, 2010, to provide a debtor with a final loss mitigation

[3] In a related argument, the Burys claim that, because the trustees "fabricated a default," they have "unclean hands." Ordinarily, the defense of unclean hands should be raised before the foreclosure sale in a motion for a pre-foreclosure injunction. *See Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 728-31 (2007). Even assuming that the Burys could raise that defense after the foreclosure sale in a motion to set aside the sale, the circuit court was well within its discretion to reject the Burys' belated and unsworn assertions that the lenders' sworn affidavit of default was false.

statement and an application to request post-filing mediation. The Burys, however, did not raise that issue in the circuit court. Consequently, they have not preserved the issue for appeal. *See* Md. Rule 8-131(a). We cannot fault the circuit court for failing to consider an issue that the Burys neglected to raise.

But even if the Burys had raised the issue of compliance with RP § 7-105.1(i) in the circuit court, we would reject their contention on appeal. The enactment that is now found at § 7-105.1(i) became law as part of Chapter 485 of the Acts of 2010, which took effect on July 1, 2010. Section 8 of that enactment states that the legislation "shall be construed to apply only prospectively" and that it "may not be applied or interpreted to have any effect on or application to any order to docket or complaint to foreclose on residential property filed before [its] effective date" of July 1, 2010." *Available at* http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/017000/017816/unrestricted/20131828e-004.pdf (last viewed Sept. 19, 2016).

The substitute trustees filed their complaint in this case on May 28, 2010, more than a month before the new statute's effective date. By its terms, therefore, § 7-105.1(i) has no bearing on this case. The circuit court could not have erred by failing to ensure that a lender complied with a statute which, by its terms, did not apply.

C. The Advertisement

The Burys contend that the circuit court erred by rejecting their contention that the advertisement for the foreclosure sale was "deficient." According to the Burys, the advertisement should have stated that the house, which was reconstructed after a fire in 2007, was "newly built in 2008." In addition, the Burys complain that the advertisement

erroneously stated that the house had three bedrooms (it has only two), but that it had only one bathroom (it has two). The Burys also complain that the advertisement omitted to mention an in-law apartment, although the apartment may well be the third bedroom to which the advertisement referred. The Burys made no attempt to show that they suffered any prejudice as a result of the alleged defects in the advertisement.

The advertisement of a foreclosure sale "'is sufficient if it describes the property so that it can be located by the exercise of ordinary intelligence and so that more detailed information concerning it could be obtained, if desired[.]'" *Fagnani v. Fisher*, 418 Md. 371, 391 (2011) (quoting *Brooks v. Bast*, 242 Md. 350, 357 (1966)). The "'failure to mention or fully describe the nature and extent of improvements . . . will not vitiate the sale unless the exceptant meets [the] burden of overcoming the presumption of validity of a judicial sale by showing that the omission was prejudicial to the sale of the property at a fair and adequate sum, and that a resale would be likely to produce a greater amount.'" *Id.* (quoting *Brooks v. Bast*, 242 Md. at 357). "The standard for evaluating the substance of the advertisement is whether 'a person of ordinary intelligence may understand [] the identity of the property to be sold . . . interpreted in the light of practical common sense.'" *Id.* at 392 (quoting *Ten Hills Co. v. Ten Hills Corp.*, 176 Md. 444, 450-51 (1939)). "'[C]ourts will not be inclined to interfere with a [foreclosure] sale fairly made because of trivial discrepancies or inconsequential errors.'" *Id.* at 391 (quoting *Ten Hills*, 176 Md. at 449).

In this case, the circuit court did not err in determining that the advertisement adequately identified the property. The advertisement gave the correct address of the

property, so that prospective bidders could view it for themselves and research the public records for information about taxes, title, and liens. It informed prospective bidders about how to obtain additional information concerning the property. It gave a rough description of what the house's attributes were "believed" to be (three bedrooms rather than two plus an in-law apartment, one bathroom rather than two, a full basement, and a deck), but it expressly disclaimed "any representations or warranties with respect to the accuracy of the information" in the advertisement and "urged" bidders "to perform their own diligence." In short, this advertisement did what it was required to do – it "'describe[d] the property so that it [could] be located by the exercise of ordinary intelligence and so that more detailed information concerning it could be obtained, if desired[.]'" *Fagnani*, 418 Md. at 391 (quoting *Brooks v. Bast*, 242 Md. at 357).

An omission from the advertisement, such as the failure to mention the in-law apartment or the reconstruction of the dwelling in 2008, could affect the sale only if the Burys discharged their burden of proving prejudice. *Id.* (quoting *Brooks v. Bast*, 242 Md. at 357). In their written exceptions in the circuit court, however, the Burys did not attempt to prove that the omissions resulted in an unfair or inadequate sales price or that a resale would yield a higher price. The court could not have erred in overruling exceptions that completely failed to address an essential issue on which the Burys had the burden.

The Burys argue that they did not have to overcome the presumption of regularity in their written exceptions because, they say, they would have done so at a hearing on their exceptions. Under Rule 14-305(d)(2), however, the court was required to accede to

the Burys' request for a hearing only if "the exceptions or any response clearly show[ed] a need to take evidence." The Burys may not create "a need to take evidence" by omitting evidence in the first instance. Because the Burys did not comply with their obligation of setting forth the basis for their exceptions, including the basis for any claim of prejudice, "with particularity" (Md. Rule 14-305(d)(1)), the court had no obligation to conduct a hearing on that issue.

D. Inadequate Notice to the Burys

Md. Rule 14-210(b) requires that the seller notify the borrower of a foreclosure sale, by certified mail, "not more than 30 days and not less than ten days before the date of the sale." In an unsworn affidavit that accompanied a motion to alter or amend the ruling in which the court rejected their exceptions, Ms. Bury asserted, for the first time, that she did not receive the requisite notice of the foreclosure sale. The circuit court denied the motion to alter or amend, and we review its decision for abuse of discretion. *See*, *e.g.*, *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484-85 (2002).

"[A] motion to alter or amend under Rule 2-534 is not an occasion for a party to make arguments that it neglected to make initially." *Morton v. Schlotzhauer*, ___ Md. ___, 2016 WL 4411361, at *6 n.10 (Aug. 19, 2016). "A circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should have, been made earlier, and consequently was waived." *Id.* As Judge Moylan has explained:

> What is, in effect, a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. The trial judge has boundless discretion not to

> indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been [made] earlier but were not. Losers do not enjoy *carte blanche*, through post-trial motions, to replay the game as a matter of right.

Steinhoff v. Sommerfelt, 144 Md. App. at 484.

If the Burys truly did not receive timely notice of the sale, they undoubtedly knew or should have known of the defect by the time for filing their exceptions, 30 days after the sale itself. They failed to raise that issue, however, until after the court had denied their exceptions. In these circumstances, the court did not abuse its almost "boundless discretion" in denying the motion to alter or amend. *Id.*

In any event, in opposing the motion to alter or amend, the substitute trustees attached the Postal Service form that evidenced service of the notice of sale on Ms. Bury. The form showed that Ms. Bury acknowledged her receipt of the notice on July 31, 2014, 20 days before the foreclosure sale. Because the Burys were required to receive notice "not more than 30 days and not less than ten days before the date of the sale" (Md. Rule 14-210(b)), and because 20 is not more than 30 and not less than 10, the circuit court was clearly correct, not clearly erroneous, in rejecting any factual contention that the Burys did not receive due notice.

E. Failure to Conduct a Hearing

The Burys complain that the circuit court failed to give "appropriate scrutiny" to the sale and that it ratified the sale "without ensuring that the [appellees] had complied with all applicable Maryland rules and statutory provisions." Their complaint appears to center on the court's failure to examine their contentions at an evidentiary hearing.

The circuit court, however, had no obligation to conduct a hearing. Unless the court sets aside a foreclosure sale, it must conduct a hearing on exceptions only if someone requests one, and "the exceptions or any response clearly show a need to take evidence." Md. Rule 14-305(d)(2). The court has broad discretion to decide when there is a "need to take evidence." *See*, *e.g.*, *Four Star Enters. Ltd. P'ship v. Council of Unit Owners of Carousel Ctr. Condo., Inc.*, 132 Md. App. 551, 567-68 (2000).

We see no basis to conclude that the circuit court abused its broad discretion to decide the Burys' exceptions without conducting an evidentiary hearing. Even assuming that the "fabricated default" was a proper basis for exceptions to a foreclosure sale (which it is not), the record contained ample evidence to conclude that the Burys had admitted to being in default during the bankruptcy court proceedings. Similarly, the record contained ample evidence to review the adequacy of the advertisement of sale. The court had no reason to conduct a hearing concerning the alleged violation of RP § 7-105.1(i), because the Burys never brought that issue to the court's attention. The Burys were not entitled to a hearing on their claim of untimely notice, because they did not make it until their motion to alter or amend the order that overruled their exceptions. *See* Md. Rule 2-311(d) ("[w]hen a motion is filed pursuant to Rule . . . 2-534, the court shall determine in each case whether a hearing will be held").

Because the circuit court denied their exceptions in a one-line order, the Burys assert that the court must have failed to exercise its discretion. To the contrary, given that judges are presumed to know the law, the court order reflects a decision not to launch into an exegesis detailing the faults in the Burys' exceptions. The circuit court explicitly

stated that its order was "[u]pon consideration of the Exceptions." The Burys' contention that the court "deci[ded] not to . . . consider the particular circumstances of this case" is as unsupported as it is unpersuasive.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.